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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DONALD EARL BOOKER, Defendant and Appellant.	B286842 (Los Angeles County Super. Ct. No. GA099455)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Conditionally reversed in part and remanded with directions.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Donald Earl Booker of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1], attempted murder (§§ 664/187, subd. (a)), and mayhem (§ 203). As to each offense, the jury found true the allegation that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) The trial court sentenced defendant to 45 years to life in state prison.

On appeal, defendant contends the trial court erred in excluding impeachment evidence; in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter, on the victim's antecedent threats, that his extrajudicial statement threatening to kill his victim should be viewed with caution, and that a box cutter is an inherently dangerous weapon; in denying a mistrial; and in denying his request for a competency hearing, the judgment must be conditionally reversed and remanded for the trial court to conduct a diversion eligibility hearing pursuant to section 1001.36; the matter must be remanded so the trial court can exercise its discretion about whether to strike two sentencing enhancements under section 667, subdivision (a); and the cumulative prejudicial effect of the trial court's errors requires reversal. We conditionally reverse defendant's assault with a deadly weapon, attempted murder, and mayhem convictions and remand for a hearing to determine his eligibility for a mental health diversion program pursuant to section 1001.36.

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[1] All further statutory citations are to the Penal Code unless otherwise noted.

II. BACKGROUND

Dale Ross had known and been friends with defendant and Treopia Ross for about 20 years.[2] He testified that at around 9:00 a.m. on August 11, 2016, he and Treopia drank beer and smoked crystal methamphetamine at his house.

After smoking methamphetamine for about an hour, Dale and Treopia went to the Sparr liquor store. Defendant was at the parking lot. Defendant and Treopia spoke. Dale was close by. He did not remember hearing defendant tell Treopia that he was going to kill her.

At some point, Dale saw defendant take a swing at Treopia. Dale though they were playing, "like sand boxing or something." Defendant and Treopia struggled for about 20 or 30 seconds. They were swinging at each other—Treopia threw punches.

During the altercation, Dale did not see either defendant or Treopia in possession of a box cutter. He had previously seen Treopia with knives—"everybody around there carries knives and stuff." He saw her with a knife earlier that day.

At about 8:46 a.m. on August 11, 2016, Deciderio Flores was driving on Huntington Drive in Duarte. He saw defendant chasing Treopia. When defendant got close to Treopia he would "swing[] on" her. He did not see Treopia swing at defendant. It appeared that defendant had something that looked like a knife in his hand. Treopia screamed for help. Flores believed that Treopia was going to be hurt and called the police.

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[2] Because Dale Ross and Treopia Ross share a last name, we will refer to them by their first names for clarity.

Flores testified that Treopia and defendant ran into a liquor store. At some point, defendant came out and walked swiftly to a Carl's Jr. across the street.

Treopia testified that she had been convicted of misdemeanor assault with a deadly weapon in 2006 and felony forgery in February 2007. She had felony charges pending for allegedly striking and pepper spraying her 70-year-old father.

At about 8:40 a.m. on August 11, 2016, Treopia was at the Sparr liquor store in Duarte. Defendant was in the parking lot when she arrived. Treopia called Dale, who she knew was at the Carl's Jr. At some point, Treopia approached Dale because she wanted to go to his house to dye her hair—she was homeless at the time.

As Treopia and Dale spoke, defendant said, "Hey, Dale," and motioned to Dale to come over. Dale went to defendant to see what he wanted. Treopia went into the liquor store and spoke to a store employee for 10 or 15 minutes.

Treopia then left the store and asked Dale, "'Dale, you ready?'" Dale appeared not to hear Treopia and so approached her. Defendant remained behind. Defendant then asked, "'What you doing talking about me?'" Dale walked back and forth between Treopia and defendant. At some point, defendant walked with Dale to Treopia.

Defendant "was looking [Treopia] up and down." She asked him, "'Why are you maddogging me, looking me up and down like that?'" Defendant said, in a normal tone of voice, "Bitch, shut up. I'm going to kill you." Defendant then swung at Treopia and she put her hand up so he would not hit her in the face. Treopia had not threatened defendant or swung at him.

Defendant's blow, with a box cutter, made contact with the palm of Treopia's right hand and cut her. Defendant then tried to pull Treopia's hair back and cut her throat. To defend herself, Treopia put her "hands up, like to square off with him" in a fighting position. Defendant then cut Treopia's left hand, cutting her to the bone.

Treopia ran into the street and screamed for help and for someone to call the police. Defendant pursued and tried to catch her. Treopia ran inside the Sparr liquor store. Defendant followed her. Treopia asked the liquor store employee to call the police.

Treopia was taken to the hospital where she had surgery on her hands that lasted five or six hours. She had casts on her hands for two weeks and could not use them. Treopia was in a lot of pain when she left the hospital. She suffered lasting impairment to one of her hands that prevented her from continuing her employment braiding hair.

Deputy Sheriff Brendon Jackson responded to the Sparr liquor store. There, he spoke with Dale. Dale said he was standing with Treopia in a dirt lot when defendant approached. Treopia asked defendant, "Why you looking me up and down?" Defendant responded, "Shut up, bitch; I'll kill you."

III. DISCUSSION

A. *The Trial Court's Evidentiary Rulings*

Defendant contends that the trial court abused its discretion when it did not permit him to cross-examine Treopia about the claimed lasting impairment to one of her hands by

asking if she punched her father in the months after defendant cut her. The trial court also erred, he contends, when it prevented him from cross-examining Dr. Hu, the surgeon who operated on Treopia's hands, and Treopia about whether Treopia had methamphetamine in her system on the day of the incident. The evidence was relevant, defendant contends, to impeach Treopia and "to show that events in the parking lot did not occur the way the jury found they did."

The exclusion of the evidence was prejudicial, defendant argues, because "[n]o evidence was presented as to why this fight happened. We don't know where the box cutter came from, or what started the fight. It could have been that Treopia Ross started the fight and [defendant] was defending himself. Treopia Ross had charges filed against her. It could have been that she was trying to get on the good side of law enforcement, and what she was saying was not true. She could have been embellishing. Treopia Ross was the only person from whom any evidence of whether [defendant] had the intent to kill came from. Had defense counsel been able to impeach her as he requested, the jury could well have found the events in the parking lot occurred differently."

Only relevant evidence is admissible. (Evid. Code, § 350.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) In determining a witness's credibility, a jury may consider "any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony." (Evid. Code, § 780.)

We review a trial court's ruling on the exclusion of evidence for an abuse of discretion. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) The erroneous exclusion of evidence is governed by the standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1311.) Under that standard, the erroneous exclusion of evidence is harmless unless it is reasonably probable that a result more favorable to the defendant would have been reached had the evidence been admitted. (*Watson, supra,* 46 Cal.2d at p. 836.)

In response to Treopia's testimony that she suffered lasting impairment to one of her hands, defense counsel requested that the trial court allow him to ask Treopia whether she was still able to strike people with her fist, specifically, if she was able to strike her father five months after defendant attacked her. Defense counsel argued the evidence would impeach Treopia and would show a propensity for violence. The trial court ruled that defense counsel could ask Treopia whether she could make a fist or maneuver her hand, but not if she was able to punch someone.

Defense counsel also sought to introduce and ask Dr. Hu about Treopia's medical records that showed, among other things, a history of drug and alcohol abuse and that Treopia tested positive for methamphetamine on the day of the attack. He further requested to cross-examine Treopia about her substance abuse that day. The evidence of Treopia's methamphetamine use, defense counsel argued, would impeach Treopia's testimony that she did not use methamphetamine that day. The trial court excluded the evidence as irrelevant and immaterial. It further found that the evidence was highly prejudicial and that its

presentation would be unduly time consuming under Evidence Code section 352.

Even assuming the trial court erred in excluding the evidence, any such error was harmless. First, Treopia's credibility was independently impeached with evidence of her prior misdemeanor assault with a deadly weapon and felony forgery convictions. Second, Dale testified that on the morning prior to the attack, he and Treopia smoked methamphetamine for about an hour at his house, which further impeached Treopia's testimony about her drug use. Third, the version of the incident at the Sparr liquor store parking lot that the jury heard from Treopia was largely corroborated. She testified that defendant approached her, looked her up and down, called her a "bitch," and said he was going to kill her. Defendant then swung at her twice, slashing both of her hands with a box cutter, and attempted to slit her throat. She testified that she did not swing at defendant. Dale testified he saw defendant and Treopia swing at each other. Deputy Jackson testified that Dale told him that defendant called Treopia a "bitch" and said he was going to kill her. Flores testified he saw defendant chase Treopia and swing at her. He further testified that defendant appeared to have something in his hand that looked like a knife. Flores did not see Treopia swing at defendant. Given such evidence, it is not reasonably probable that a result more favorable to defendant would have been reached had defendant's impeachment evidence been admitted. (*Watson, supra,* 46 Cal.2d at p. 836.)

B. *Instructions on the Lesser Included Offense of Attempted Voluntary Manslaughter*

Defendant contends that the trial court erred in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter based on the theories of imperfect self-defense and heat of passion. Because substantial evidence supported neither theory, the trial court did not err.

1. Standard of Review

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Prunty* (2015) 62 Cal.4th 59, 69.) A trial court must instruct, sua sponte, on all theories of a lesser included offense that are supported by substantial evidence, but not those without such evidentiary support. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid.*)

2. Analysis

a. Imperfect self-defense

"'Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually,* but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.' [Citation.] As [the Supreme Court] explained in *People v. Barton* (1995) 12 Cal.4th 186, 200-201 . . . imperfect self-defense is not an affirmative defense, but a description of one type of voluntary manslaughter. Thus the trial court must instruct on this doctrine, whether or not instructions are requested by counsel, whenever there is evidence substantial enough to merit consideration by the jury that under this doctrine the defendant is guilty of voluntary manslaughter. [Citation.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 529.)

Defendant contends that the trial court should have given an imperfect self-defense instruction because Dale testified that he saw Treopia fighting with defendant, everyone in the area carried a knife, and defense counsel raised a lot of questions regarding Treopia's trustworthiness. That evidence, defendant contends, "sufficiently portrayed [him] as acting in unreasonable belief that he was in imminent danger of death or great bodily injury." We disagree. No evidence was adduced that Treopia was armed with a knife during her struggle with defendant, that defendant believed Treopia was armed with a knife, or that

defendant actually believed that an armed Treopia posed an imminent danger of death or great bodily injury.

b. Heat of passion

Heat of passion arises when the victim has engaged in provocative conduct such that "'"at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."' [Citation.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Heat of passion voluntary manslaughter has an objective element—did the victim engage in conduct that would provoke a reasonable person to kill, and a subjective element—was the defendant actually acting under the influence of a strong passion when he killed. (*People v. Wickersham* (1982) 32 Cal.3d 307, 327 disapproved on another ground by *People v. Barton* (1995) 12 Cal.4th 186, 201.)

There was no evidence that Treopia did or said anything sufficiently provocative to cause an average person to react with deadly passion. (*People v. Wickersham, supra,* 32 Cal.3d at p. 327.) Also, there was no evidence that defendant acted under the influence of such a passion. (*Ibid.*) Defendant admits as much when he argues that "[w]e don't know what happened" in the parking lot and "[n]o evidence was presented as to why the fight occurred." Accordingly, the trial court did not err when it did not give a heat of passion voluntary manslaughter instruction.

Defendant argues that the objective element of heat of passion was satisfied because "Treopia Ross may have engaged in conduct 'sufficiently provocative to cause an ordinary person of average disposition to act rashly, or without due deliberation and reflection,' and lunge at her with a box cutter." He argues the subjective element was satisfied because he "could have swung at Treopia while under the actual influence of a strong passion induced by provocation." Defendant's speculative argument and failure to cite any supporting evidence is dispositive. (*People v. Breverman, supra,* 19 Cal.4th at p. 162 [a trial court has no sua sponte duty to instruct on a lesser included offense not supported by evidence].)

C. *Antecedent Threats Instruction*

Defendant contends that the trial court erred by omitting from CALCRIM No. 3470[3] (Right to Self-Defense or Defense of

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[3] The trial court instructed the jury with CALCRIM No. 3470 as follows:

"Self[-]defense is a defense to Assault With a Deadly Weapon, Attempted Murder and Mayhem. The defendant is not guilty of those crimes if he used force against the other person in lawful self[-]defense.

"The defendant acted in lawful self[-]defense if, one, the defendant reasonably believed that he was in [im]minent danger of suffering bodily injury or was in imminent danger of being touched unlawfully.

"Two, the defendant reasonably believed that the immediate use of force was necessary to defend against that danger, and, three, the defendant used no more force than was reasonably necessary to defend against that danger.

Another (Non-Homicide)) two optional or bracketed paragraphs[4] that he contends would have allowed the jury to consider

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"Belief in future harm is not sufficient no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of bodily injury to himself or imminent danger that he would be touched unlawfully. The defendant's belief must have been reasonable and he must have acted because of that belief.

"The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend him or herself and if reasonably necessary to pursue an assailant until the danger of bodily injury has passed. This is so even if safety could have been achieved by retreating.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self[-]defense. If the People have not met this burden, you must find the defendant not guilty of Assault With a Deadly Weapon, Attempted Murder or Mayhem."

[4] CALCRIM No. 3470 has five optional paragraphs that may be given depending on the facts in a case. Defendant does not specify which two paragraphs were erroneously omitted. It appears, however, that he is referring to the following two paragraphs:

evidence that Treopia previously harmed someone in deciding whether defendant had a reasonable belief in the need to defend himself, even if he did not know about the prior assault. The trial court did not err.

We apply the de novo standard of review when assessing whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) A trial court is required to instruct on a defense "if, but only if, substantial evidence support[s] the defense." (*People v. Watson* (2000) 22 Cal.4th 220, 222.)

During a discussion of jury instructions, the trial court stated it was going to instruct with CALCRIM No. 3470, but that it would omit paragraphs that related to Treopia's history of violence that might have been known to defendant because it had not permitted the introduction of such evidence. Defense counsel stated his continuing disagreement with the trial court's evidentiary ruling, adding that the requested optional paragraph—"If you find that Treopia Ross threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable"—allowed the jury to consider Treopia's prior assaultive behavior regardless of whether defendant was aware of it.

"[If you find that <insert name of victim> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

"[If you find that the defendant knew that <insert name of victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]" (CALCRIM No. 3470.)

The prosecutor stated his belief that the important part of the requested paragraph was whether defendant's conduct and beliefs were reasonable, that is, defendant's beliefs based on Treopia's prior bad acts; and there had been no evidence defendant knew about any prior bad acts.

The trial court stated that under defense counsel's offer of proof, there was no evidence that Treopia had threatened or harmed defendant in the past. Defense counsel responded that he was not relying on the part of the paragraph that concerned prior threats or harm to defendant. The trial court stated it understood defense counsel's request concerned prior threats or harm to others and that it was defense counsel's position that the paragraph was appropriate even if defendant did not know of any such threats or harm. It ruled that it did not have to decide whether the paragraph required defendant to have knowledge of prior threats or harm to others because there had been no evidence Treopia had threatened or harmed others in the past.

Defense counsel noted the jury had heard that Treopia had been convicted of assault with a deadly weapon. The trial court responded that such evidence had been admitted for impeachment and the jury had not heard about the conduct underlying the conviction. Defense counsel stated the reason the jury had not heard about the underlying conduct was because the trial court had precluded its admission. The trial court agreed, and stated it would not give "those paragraphs."

Defendant argues the trial court should have given the first optional paragraph—"If you find that [Treopia Ross] threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable"—because "there was sufficient evidence

of antecedent threats to another." The jury had heard that Treopia had been convicted of misdemeanor assault with a deadly weapon in 2006.[5]

The trial court properly rejected defendant's request for the optional paragraph. The purpose of that paragraph is to guide the jury in evaluating evidence that might bear on the reasonableness of a defendant's conduct and beliefs in support of the jury's self-defense determination and thus requires for its justification substantial evidence that a defendant knew of the victim's prior threats or harm to others. (*People v. Bates* (May 7, 2019, C086471) ___ Cal.App.5th ___ [2019 Cal.App. Lexis 416, *13-15].) There was no evidence adduced at trial that defendant knew of Treopia's 2006 misdemeanor assault with a deadly weapon conviction.

Defendant argues the trial court should have given the second optional paragraph—"If you find that the defendant knew that [Treopia Ross] had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable"—because defendant "grew up in the same city as Treopia" and "[i]t is conceivable that he knew of her assaultive behavior." There are two problems with defendant's argument. First, he did not request that the trial court give this optional paragraph and thus has forfeited this issue on appeal. (*People v. Andrews* (1989) 49

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[5] Based on a pretrial discussion of evidence offered for impeachment, defendant asserts that Treopia also had a 1993 conviction for misdemeanor assault with a deadly weapon. Because the trial court ruled evidence of that conviction inadmissible and the jury never learned of it, that conviction could not serve as the basis for the requested paragraph.

Cal.3d 200, 218 ["Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"].) Second, as with the first optional paragraph, there was no evidence adduced at trial supporting the instruction. (See *People v. Bates*, *supra*, ___ Cal.App.5th ___ [2019 Cal.App. Lexis 416, *13-15].) That is, there was no evidence that defendant knew of Treopia's 2006 misdemeanor assault with a deadly weapon conviction. The speculative proposition that defendant conceivably could have known of the prior conviction because he and Treopia grew up in the same city falls far short of substantial evidence justifying the paragraph.

D. *CALCRIM No. 358*

Defendant asserts that the trial court erred in denying his request that it add to CALCRIM No. 358[6] the advisement that the jury was to consider with caution any extrajudicial statement he made that tended to show his guilt unless the statement was written or otherwise recorded. The trial court should have granted defendant's request, but the error was harmless.

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6 The trial court instructed the jury with CALCRIM No. 358 ("Evidence of Defendant's Statements") as follows:

"You have heard evidence that the defendant made a[n] oral or written statement before the trial. You must decide whether the defendant made any such statement, in whole or in part. [¶] If you decide that the defendant made such a statement, consider the statement along with all the other evidence in reaching your verdict. It is up to you to decide how much importance to give to the statement."

When the trial court discussed jury instructions with the parties it said, "As to 358, the court has agreed to give that instruction on the defense request. There was a statement made by the defendant; not to the police, but to the victim, which he indicated he wanted to kill her." The trial court then confirmed that defendant also was requesting that it add to CALCRIM No. 358 the additional advisement that the jury was to "[c]onsider with caution any statement made by defendant tending to show his guilt unless the statement was written or otherwise recorded."

Defense counsel responded that he was requesting the additional advisement. The trial court denied defense counsel's request because it believed the advisement "is intended in situations where it's, for example, a statement to the police, and the police are testifying to a statement of the defendant; however, that statement was not recorded or written down, and it's just the oral statement that's being introduced."

The cautionary instruction defendant requested "applies to any extrajudicial oral statement by the defendant that is used by the prosecution to prove the defendant's guilt," including a statement "admitted to show the defendant's state of mind." (*People v. Diaz* (2015) 60 Cal.4th 1176, 1187.) A trial court's refusal to give such a cautionary instruction is reviewed for prejudice under *Watson, supra*, 46 Cal.2d at pages 835-836, that is, whether it is reasonably probable the jury would have reached a result more favorable to the defendant if the trial court had given the instruction. (*People v. Diaz, supra,* 60 Cal.4th at p. 1195.) "'Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in

failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the [statements] were repeated accurately.' [Citation.]" (*Ibid.*)

Here, the prosecution used defendant's extrajudicial oral statement to show his state of mind and thus prove his guilt of attempted murder. With respect to the specific intent to kill necessary for attempted murder, the prosecutor told the jury, "So you do not need someone to be saying, 'I intend to kill you' although we have that in this case." We infer the prosecutor's statement to be a reference to Treopia's testimony that defendant said to her, "Bitch, shut up. I'm going to kill you," and Deputy Jackson's testimony that Dale reported defendant's statement to Treopia as "Shut up, bitch; I'll kill you." Because the prosecution used defendant's extrajudicial oral statement to prove his guilt, the trial court erred in denying defendant's requested cautionary instruction. (*People v. Diaz, supra,* 60 Cal.4th at p. 1187.)

The trial court's error in denying the requested instruction, however, was harmless. Treopia's trial testimony that defendant said, "Bitch, shut up. I'm going to kill you," was corroborated by Dale's near identical statement to Deputy Jackson that defendant said, "Shut up, bitch; I'll kill you." (*People v. Diaz, supra,* 60 Cal.4th at p. 1195 ["minor variations in the exact wordings of . . . statements are not the sort of inconsistencies that would cause a jury to question whether the statements were actually made, even when the testimony is viewed with caution"].) Also, there was no evidence contradicting Treopia's and Dale's testimony that the statement was made. (*Ibid.* citing *People v. Dickey* (2005) 35 Cal.4th 884, 906 for the proposition that "'[w]here there was no such conflict in the evidence, but simply a denial by the

defendant that he made the statements attributed to him, we have found failure to give the cautionary instruction harmless.'")

E. *Assault With a Deadly Weapon Instruction*

Defendant contends his conviction for assault with a deadly weapon must be reversed because the trial court's instruction defining "deadly weapon" erroneously allowed the jury to find a box cutter to be an inherently deadly weapon. We agree that the trial court erroneously instructed the jury, but hold the error was harmless.

The trial court instructed the jury with CALCRIM No. 875 ("Assault With a Deadly Weapon") that "[a] *deadly weapon other than a firearm* is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." That is, the jury could have found defendant guilty of assault with a deadly weapon either because it found the box cutter to be "inherently deadly" or because it found that he used the box cutter "in such a way that it [was] capable of causing and likely to cause death or great bodily injury."

As the Attorney General concedes, a box cutter in not an "inherently deadly weapon." (See *People v. McCoy* (1944) 25 Cal.2d 177, 188 (*McCoy*) ["While a knife is not an inherently dangerous or deadly instrument as a matter of law, it may assume such characteristics, depending upon the manner in which it was used, and there arises a mixed question of law and fact which the jury must determine under proper instructions from the trial court. [Citations.] Pertinent in this connection is the case of *People v. Raleigh* [(1932)] 128 Cal.App. 105, 108-110

. . . , where the court pointed out the distinction between instrumentalities which are 'weapons' in the strict sense of the word, such as guns, dirks, etc., and those instrumentalities which are not weapons in that sense, such as ordinary razors, pocket-knives or other sharp objects"]; *People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1153 (review granted in S248105 (July 5, 2018))[7] ["A box cutter is a type of knife, and 'a knife'—because it is designed to cut things and not people—'is not an inherently dangerous or deadly instrument as a matter of law'".]) Thus, it was error to instruct the jury that it could find defendant guilty of assault with a deadly weapon if it found the box cutter to be an inherently deadly object, instrument, or weapon.

Having held that the trial court erroneously instructed the jury, we must determine whether the error was prejudicial. Courts of appeal differ on the correct standard for evaluating prejudice. (Compare *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 319-321 [applying the beyond a reasonable doubt standard] with *People v. Aledamat, supra,* 20 Cal.App.5th at pp. 1153-1154 [requiring a showing that the jury actually relied on the valid definition of "deadly weapon"].) We hold the error was harmless under either standard.

Although the jury was instructed on both a correct and an incorrect legal theory, there is no doubt that it actually relied on the valid theory that defendant used the box cutter in such a way that it was capable of causing and likely to cause death or great

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[7] See Cal. Rules of Court, rule 8.1115(e)(1) ["Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only"].)

bodily injury. In his closing and rebuttal arguments, the prosecutor never mentioned the incorrect legal theory—that the jury could find a box cutter to be inherently deadly. Instead, he focused on the manner in which defendant used the box cutter, the correct legal theory. Likewise, defense counsel's closing argument did not address the incorrect legal theory.

There was no evidence that defendant used anything other than the box cutter to inflict Treopia's injuries. Thus, by its sentencing finding that defendant inflicted great bodily injury, the jury necessarily found, beyond a reasonable doubt, that defendant used the box cutter in such a way that it was capable of causing and likely to cause death or great bodily injury.

Similarly, because there was no argument or evidence that a box cutter is inherently deadly and the jury found that defendant actually caused great bodily injury, it is inconceivable that the jury did not rely on the valid legal theory.

F. *Defendant's Mistrial Motion*

Defendant contends the trial court erred in denying his mistrial motion. We disagree.

1. Background

During his cross-examination of Treopia, defense counsel asked about her relationship with defendant. Treopia testified she had previously seen defendant and knew him well enough to greet him. Defense counsel asked if she knew defendant's name. Treopia responded, "Because of other people saying that's Took.

Or that's Donald Booker. Took is his gang-banging name or whatever, and Donald Booker is his government name."

Defense counsel asked, "Now, you just said, 'gang-banging name.' You don't know if he's a gang-banger, do you?" Treopia responded, "Affiliated, I guess." Defense counsel asked, "You don't know that, do you?" Treopia responded, "I don't know personally, no. I'm just saying that's the name." Defense counsel asked, "Are you just saying that to make him sound bad?" She responded, "That's just his name, baby. I mean, I'm sorry. That's just his name. Someone told me."

The trial court then advised the jury that the trial would recess for the evening and instructed them, "As to the testimony regarding gang-banging, I ask you to please disregard that answer completely. Do not let that information enter into your deliberations in any way in this case."

The following morning, defense counsel raised Treopia's gang testimony, stating he was in a difficult position. He acknowledged that the trial court immediately admonished the jury to disregard the testimony and stated that he did not "know what more to do." He noted that he could request another admonition from the trial court and suggested the prosecutor might stipulate that there was no evidence that defendant was an active gang member.

The trial court described Treopia's gang testimony as "kind of like an off-the-cuff remark" that it believed did not have "that great of an impact." It noted that it had instructed the jury to disregard Treopia's gang testimony and not to let the testimony enter into its evaluation of the evidence or deliberations. The trial court believed the jury, with proper instructions, would disregard the gang testimony and follow the evidence. The

prosecutor stated he did not intend to ask Treopia about defendant's gang status or mention it at all. Defendant moved for a mistrial. The trial court denied the motion.

2. Analysis

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 854; *People v. Bolden* (2002) 29 Cal.4th 515, 555 ["A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial"].) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett, supra,* 30 Cal.3d at p. 854.)

"'Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured. [Citations.]' [Citation.]" (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1428-1429.) "'It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]' [Citation.]" (*Id.* at p. 1429.)

The trial court did not abuse its discretion in denying defendant's mistrial motion. Treopia's reference to defendant's purported gang affiliation status was brief, defense counsel elicited Treopia's testimony that she had no personal knowledge

of defendant's gang status, no other witness referred to defendant's gang status, the trial court admonished the jury to disregard and not consider the testimony in its deliberations, and there is no evidence that the trial court's admonition did not cure the error.

G. *Defendant's Request for a Competency Hearing*

After the jury found defendant guilty of the three charged offenses and the trial court found true the prior conviction allegations, defense counsel declared a doubt about defendant's competence. Defendant contends there was substantial evidence of his incompetence before the trial court and thus the trial court erred in failing to hold a competency hearing.

"Trial of an incompetent defendant violates the due process clause of the Fourteenth Amendment to the United States Constitution [citation] and article I, section 15 of the California Constitution. Those protections are implemented by statute in California. A criminal defendant is incompetent and may not be 'tried or adjudged to punishment' if 'as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' (§ 1367, subd. (a).) Section 1368 mandates a competency hearing if a doubt as to a criminal defendant's competence arises during trial. That may occur if counsel informs the court that he or she believes the defendant is incompetent (§ 1368, subd. (b)), or '[i]f during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the

defendant.' (§ 1368, subd. (a).)" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1281.)

"[A] trial court is not required to order a competence hearing based merely upon counsel's perception that his or her client may be incompetent. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 738, fn. 7.) "Counsel's assertion of a belief in a client's incompetence is entitled to some weight. But unless the court itself has declared a doubt as to the defendant's competence, and has asked for counsel's opinion on the subject, counsel's assertion that his or her client is or may be incompetent does not, in the absence of substantial evidence to that effect, require the court to hold a competency hearing. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1033.)

"Substantial evidence is evidence that raises a reasonable doubt about the defendant's competence to stand trial.'" (*People v. Hayes, supra,* 21 Cal.4th at p. 1281.) "To raise a doubt under the substantial evidence test, we require more than 'mere bizarre actions' or statements, or even expert testimony that a defendant is psychopathic, homicidal, or a danger to him- or herself and others. [Citations.] Rather, the focus of the competence inquiry is on a defendant's understanding of the criminal proceedings against him or her and the ability to consult with counsel or otherwise assist in his or her defense. [Citation.] Defendant's trial demeanor is relevant to, but not dispositive of, the question whether the trial court should have suspended proceedings under section 1368." (*People v. Mickel* (2016) 2 Cal.5th 181, 202.)

After the jury returned the guilty verdicts, the trial court inquired whether defendant was going to waive a jury trial on the prior conviction allegations. It first asked defendant if he understood his right to a jury trial. Defendant responded, "Why

should I choose jury trial when the jury been tampered with?" The trial court asked again if defendant understood his right to a jury trial. Defendant responded, "Yeah, I understand. Jury tainted."

The trial court then explained to defendant that the prior conviction allegations could result in a minimum term of 35 years to life. Claiming the jury had been tampered with, defendant stated that he did not want to remain in the courtroom and left, accompanied by deputy sheriffs.

When defendant returned to the courtroom, he asked to address the trial court. The trial court advised defendant to confer with defense counsel first. Defendant responded, "Counsel? I'm through with all of this because it's over with. I can represent myself. I just want to speak to you because I came in front of you once before, and you remember they were trying to do the same thing to me. You sent me to Patton State Hospital, and they dismissed the case. [¶] It's like, he don't have no evidence. He took the videotape from surveillance camera. He been doing all the blood, all the pictures and everything. He took all of that out, and then he going to sit up here again, go tamper with the jury. [¶] All of this has been preplanned, premeditated. This is a conspiracy."

The trial court stated that all it wanted to know was whether defendant was waiving his right to a jury trial on the prior conviction allegations. Defendant responded, "Yeah, go ahead." Defense counsel joined.

The trial court ordered defendant to appear the next day so it could excuse the jury. Defendant stated that he would not be returning. The trial court asked defendant if he could excuse the jury in his absence. Defendant responded, "Yeah, it's okay."

The trial court then tried to schedule the trial on the prior conviction allegations and sentencing. It asked defendant if he agreed to a continuance to a particular date. Defendant responded, "I'm damned if I don't, damned if I do. What difference is it?" The trial court asked if defendant agreed to the continued date. Defendant responded, "Yeah."

On the date set for the court trial on the prior conviction allegations, defendant informed the trial court that, "[Defense counsel] is not my attorney. He's fired. I'd like to get that perfectly understood; that is not my attorney." The trial court treated defendant's statements as a *Marsden*[8] motion for appointment of new counsel. The trial court denied the motion.

When the proceedings resumed, defendant again said that defense counsel was not his attorney. Apparently referring to a prosecutor (prosecutor no. 2), defendant said, "He's not supposed to be in this courtroom. [Prosecutor no. 1], the one with the gray hair, that's the one that was assigned to this case. He's over here illegally." Defendant continued, "He's not supposed to be here, that's why he got that smirk on his face. I bet you get away with it."

The trial court told defendant that he needed to calm down. Defendant responded, "Calm down, you sit here and this mother-fucker here falsely accused me. He had me set up. He followed me for four years and had that broad allowing me. Then he took the video out the store with the surveillance camera where she was inflicting wounds. And then you all hid that shit and covered it up. And I'm supposed to be happy about it[?] You talking about 36 years to life."

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8 *People v. Marsden* (1970) 2 Cal.3d 118.

The trial court informed defendant that if he could not be quiet, he would be removed from the courtroom. Defendant said the trial court wanted him present the day before. The trial court said defendant needed to be quiet. Defendant responded, "But you don't like it, do you?" The trial court told defendant that if he could not be quiet, he would be removed and sentencing would take place without him.

Just after the trial on the prior conviction allegations began, the bailiff informed the trial court that defendant wanted to leave. The trial court asked defendant if he wanted to leave. Defendant said that he did. The trial court asked defendant whether he wanted to be present for sentencing and if he understood that if he left, it would proceed with sentencing. Defendant did not respond and was escorted from the courtroom. As he was leaving, defendant said, "—sit through this shit. I ain't even supposed to be in this courtroom."

After a recess during the trial on the prior conviction allegations, the trial court and defendant had the following discussion:

"The Court: Mr. Booker, I brought you back out because we are still in the middle of the court trial on the priors, and then we still have sentencing to do.

"The Defendant: That dude right there, [prosecutor no. 2], he's not the district attorney that was assigned to this case.

"The Court: Okay.

"The Defendant: It was [prosecutor no. 1.[9]] He's not supposed to be in this courtroom.

"The Court: Let me ask you one question.

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[9] Prosecutor no. 2 later explained that he had taken over prosecutor no. 1's cases.

"The Defendant: No, I told you earlier, no. What part of that you don't understand, no.

"The Court: Do you want to be here?

"The Defendant: I told you earlier when I walked out, I don't want to have nothing. [Defense counsel] is not my attorney. I already been told what to do.

"The Court: All right. So did you want to not be here for the rest of the court trial and sentence?

"The Defendant: All this is a lie. You taking me to trial in municipal court. This is misdemeanor court. You bond me over to the superior court, which is Pasadena.

"The Court: All right.

"The Defendant: You all trying to cover up and hide the truth. He's not supposed to be here.

"The Court: I will take that as a no, you do not want to be here.

"The Defendant: I don't. I told you.

"The Court: [Defense counsel], do you wish to offer anything?

"[Defense counsel]: No, your Honor.

"The Court: All right. All right. Do you want to go on the bus? Do you want to just completely absent yourself from these proceedings?

"The Defendant: Man, what did I tell you. Either you don't hear good or listen good.

"The Court: Is that yes?

"The Defendant: You threatened me yesterday if I don't come to court you're going to extract me. You have that sorry piece of shit, [defense counsel] over there.

"The Court: The deputies want to know if you want to go on the bus.

"The Defendant: I told you earlier.

"The Court: Do you want to [get] on the bus.

"The Defendant: You all can spare me this dramatic bullshit.

"The Court: Okay.

"The Defendant: You will hear it again. So don't try to get cute with me. Take me to trial in municipal court.

"The Court: Once again, Mr. Booker has been escorted out of the courtroom. He does not . . . want to participate in these proceedings. So we will proceed . . . ."

At the conclusion of the trial, the trial court found true the prior conviction allegations. Defense counsel then made a new trial motion. The trial court denied the motion. Defense counsel then said, "[I]n light of Mr. Booker's behavior today, his comments at the hearing, I'm wondering if he is now competent, even though he might have been competent at an earlier time during the proceedings, his behavior would seem to suggest that he is not currently competent."

The trial court denied the motion, explaining, "Well, if you're raising a doubt as to his competency based on simply his actions here in court today, I think I would deny that. It didn't seem to me—while I agree that he has mental health issues, it didn't seem to me that he wasn't fully aware as to what was occurring. He knew that you're his lawyer. He knew I was the judge. He knew who the district attorney was. Although, he believes [prosecutor no. 2] is the wrong guy who's supposed to be here today, but other than that, I think obviously he knew that he was here for sentencing.

"He knew that we were—he was going to be sentenced on this case. And so I think it's just a matter that he is upset. And, you know, obviously displayed words that indicated that he harbors, you know, certain beliefs about the system or us and so forth. And he was very upset, but I do not believe at this point it is an indication that he is not competent to proceed to sentencing.

"And besides, he also absented himself willfully. And I think that does not necessarily mean that he was incompetent. It just means that he was upset and angry at me or the court and so forth and does not necessarily mean that he was incompetent."

Defendant's statements before and during the trial on the prior conviction allegations were not evidence that raised a reasonable doubt about his competence to stand trial on those allegations. (*People v. Hayes, supra,* 21 Cal.4th at p. 1281.) His statements may have demonstrated frustration with his convictions on the substantive offenses and dissatisfaction with defense counsel's performance, but they did not demonstrate that he did not understand the criminal proceedings against him or that he was unable to consult with defense counsel or assist in his defense on the prior conviction allegations. (*People v. Mickel, supra,* 2 Cal.5th at p. 202.)

Although defendant may have made some "bizarre" statements, he also expressly told the trial court that he understood he had a right to a jury trial on the prior conviction allegations, he was waiving his right to a jury trial, and he knew he was facing "36 [*sic*] years to life" as a consequence of the trial on the prior conviction allegations. These statements demonstrated he understood the nature of the proceedings against him. Also, although defendant may have objected to defense counsel's performance and continuing representation,

nothing in defendant's statements demonstrated that he was unable to consult with defense counsel or assist in his defense. Accordingly, the trial court did not err in denying defendant a competency hearing.

H. *Pretrial Diversion Hearing*

Defendant contends that he is entitled to a pretrial hearing on diversion under recently enacted section 1001.36 because the Legislature intended the statute to apply retroactively. The Attorney General counters that the language of subdivision (c) of section 1001.36 demonstrates that the Legislature intended the enactment to operate prospectively, i.e., the enactment would not apply to cases such as this one in which there has already been an adjudication.

Our Supreme Court has granted review to decide whether section 1001.36 applies retroactively. (*People v. Frahs* (2018) 27 Cal.App.5th 784, review granted in S252220 (Dec. 27, 2018) (*Frahs*).[10]) Because our Supreme Court will soon have the final word, we will keep our discussion brief. We agree with the outcome in *Frahs*, and as in *Frahs*, defendant's case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of section 1001.36's threshold eligibility requirements. We will therefore remand to allow the trial court to determine whether defendant should benefit from diversion under section 1001.36. (*Frahs*, *supra,* 27 Cal.App.5th at p. 791.)

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10 See footnote 7 above.

I. *Senate Bill No. 1393*

Senate Bill No. 1393, which became effective on January 1, 2019, amended sections 667 and 1385 to give the trial court discretion to strike five-year sentence enhancements under section 667, subdivision (a) in furtherance of justice.[11] Defendant contends that in light of Senate Bill No. 1393 we should remand this matter to the trial court to allow it to decide whether to strike one or both of his section 667, subdivision (a) enhancements.

The Attorney General argues we should not remand because the trial court "clearly indicate[d]" that it would not have dismissed the enhancements even if it had the discretion when it sentenced defendant. This argument is based on the trial court's denial of defendant's *Romero*[12] motion, which was based on the nature of defendant's offenses and criminal history and its finding that "the facts of this case are very aggravated."

"'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.' [Citation.]" (*People v. McDaniels* (2018) 22

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11 The Attorney General concedes its retroactive application in this case.

12 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Cal.App.5th 420, 425 [remand in light of Senate Bill No. 620 which gave courts the discretion to dismiss or strike firearm enhancements].) A remand is not required, however, when "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*)

We disagree with the Attorney General that the trial court's remark's when denying defendant's *Romero* motion "clearly indicate[d]" that it would not have stricken one or both of defendant's section 667, subdivision (a) enhancements. The impact of those sentencing options is different. Striking a prior "strike" under the Three Strikes law would have removed the indeterminate part of defendant's sentence while striking one or more of the section 667, subdivision (a) enhancements would only have reduced the determinate part of his sentence by five or 10 years. Because we are unable to determine from the record whether the trial court would have exercised its discretion to strike one or both of defendant's section 667, subdivision (a) enhancements, we remand to allow the trial court to exercise its discretion.

J. *Cumulative Error*

Defendant contends that the cumulative prejudicial effect of the claimed errors requires reversal. There is no cumulative prejudicial effect that requires reversal.

IV. DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to, within 90 days from the remittitur: (1) consider whether to exercise its discretion to strike the section 667, subdivision (a) enhancements (in the event the conviction is reinstated); and (2) conduct a diversion eligibility hearing under section 1001.36. If the trial court determines that defendant is not eligible for diversion, then the court shall reinstate the judgment.

If the trial court determines that defendant is eligible for diversion but, in exercising its discretion, the court further determines diversion is not appropriate under the circumstances, then the court shall reinstate the judgment.

If the trial court determines that defendant is eligible for diversion and, in exercising its discretion, the court further determines diversion is appropriate under the circumstances, then the court may grant diversion. If defendant successfully completes diversion, the court shall dismiss the charges in accordance with section 1001.36, subdivision (e). If, however, defendant does not successfully complete diversion, the trial court shall reinstate the judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.